

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Parts 3, 4, 9, 14, 15, 37, 52, and 53

[Federal Acquisition Circular 84-60]

RIN 9000-AD01

**Federal Acquisition Regulation (FAR);
Procurement Integrity**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comment.

SUMMARY: On November 17, 1988, section 6 of the Office of Federal Procurement Policy (OFPP) Act Amendments of 1988 amended the OFPP Act by adding section 27. Procurement Integrity, codified at section 423 of title 41 of the United States Code, herein referred to as "the Act." An interim rule was published on May 11, 1989, in the *Federal Register* (54 FR 20488) followed by a 60-day public comment period. In November 1989, section 27 was amended by section 814 of Pub. L. 101-189 and subsequently suspended by section 507 of the Ethics Reform Act of 1989, Pub. L. 101-194, for the period December 1, 1989, through November 30, 1990. This interim rule replaces the coverage previously promulgated in FAC 84-47 and incorporates coverage resulting from the public comment period for FAC 84-47, changes to the public law, and the suspension of section 27.

The Act prohibits certain activities by competing contractors, Government procurement officials and other individuals during the conduct of a Federal agency procurement. In general, these prohibited activities involve soliciting or discussing post-Government employment, offering or accepting a gratuity, or soliciting or disclosing proprietary or source selection information.

The Act also contains certification and disclosure provisions for both contractors and Government officers and employees, imposes post-employment restrictions on Government officers and employees, and provides for criminal and civil penalties and administrative and contractual remedies for violations of the Act.

DATES: *Effective Date:* September 6, 1990.

Comment Date: Comments should be submitted to the FAR Secretariat at the address shown below on or before November 6, 1990, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4041, Washington, DC 20405.

Please cite FAC 84-60 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Sharon A. Kiser, FAR Secretariat, Office of Federal Acquisition Policy, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAC 84-60.

SUPPLEMENTARY INFORMATION:**A. Background**

Approximately 200 comments were received from 50 different commenters regarding the interim rule (FAC 84-47) implementing section 27 of the OFPP Act as originally enacted. While the FAR Council was developing a final rule which would consider the public comments, Public Law 101-189 made changes to section 27. Those changes were so significant that it is now necessary to publish another interim rule incorporating the statutory changes and addressing the public comments. In addition, the suspension of section 27 and the new statutory definition of procurement official require a more specific treatment of the applicability of section 27 as originally enacted and as amended.

The most frequent public comments were in the following areas: source selection and proprietary information; employment restrictions; the meaning of "personal and substantial"; commencement of a procurement; contractor certifications; and the definitions of "competing contractor," "procurement official," and "possible violation." In response to those comments, this interim rule makes changes in each of those areas.

Examples of changes stemming from the public comments include—the definition of "source selection information," the requirements for marking information as source selection information, and the definitions of "competing contractor," "proprietary information," and "procurement official" have been revised; a definition of "possible violation" has been added; the regulations dealing with the processing of violations have been significantly revised, including an identification of the individuals authorized to take

actions; contractor certification requirements have been simplified as a "best knowledge and belief" standard added; an optional form for obtaining ethics training certifications required of procurement officials has been added; and conforming changes to other FAR parts have been made.

The significant statutory changes are—commencement of a procurement is tied to specific actions; the definition of "procurement official" has been redefined in terms of certain specific activities; the definition of "gratuity, or other thing of value" is no longer tied to agency standards of conduct regulations and includes a governmentwide monetary standard; provisions for recusal from participation in a procurement have been added; employment restrictions with regard to subcontractors have been clarified; provisions for ethics advisory opinions for present or former Government officers or employees who are or were procurement officials have been added; and the scope of the ethics training certifications required from procurement officials has been expanded. The new statutory certification provision will require agencies to obtain new certifications for individuals who will be performing procurement official activities on or after December 1, 1990.

In addition, because the law was suspended for the period December 1, 1989, through November 30, 1990, and the definition of procurement official was statutorily changed, the interim rule was modified to emphasize the impact of the changes in law and the law's suspension on the prohibitions and restrictions applicable to procurement officials. For example—(1) the post-employment restrictions under section 27 as originally enacted only attach to individuals who perform activities during the period July 16, 1989, through November 30, 1989; (2) activities performed during the suspension period have no impact on post-employment rights; and (3) the post-employment restrictions under section 27 as amended apply on or after December 1, 1990, and may also apply as well to an individual who was a procurement official under section 27 as originally enacted and whose activities prior to December 1, 1989, would meet the definition of a procurement official under section 27, as amended.

**B. Coordination With the Director,
Office of Government Ethics**

Effective June 1, 1990, the Director of the Office of Government Ethics became responsible for issuing regulations implementing subsections 27 (a)(1),

(a)(2), (b)(1), (b)(2), (c), (f), and (k) of the OFPP Act. Those regulations are required to be issued in the FAR in coordination with the FAR Council. The provisions for which the Office of Government Ethics is responsible relate to gratuities, seeking employment, recusal, post employment, and ethics advisory opinions. Pertinent provisions of the interim rule were developed by the Office of Government Ethics in coordination with the FAR Council. The interim rule is issued by the FAR Council in coordination with the Office of Government Ethics.

C. Determination to Issue an Interim Rule

A determination has been made under authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) to issue the regulations in FAC 84-60 as an interim rule. This action is necessary to implement Public Law 100-679 in the FAR. However, pursuant to Public Law 98-577 and FAR 1.501, public comments received in response to this interim rule will be considered in formulating a final rule.

D. Regulatory Flexibility Act

The interim change (FAC 84-60) to the FAR may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The impact is likely to occur because, in connection with contract awards, extensions, and modifications in excess of \$100,000, offerors will be required to gather and provide to the Government certain information regarding the activities of the offeror during the conduct of the procurement. Therefore, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be sent to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subparts will also be considered. Such comments must be submitted separately and cite FAR Case 90-610 (FAR Case 89-23) in correspondence.

E. Paperwork Reduction Act

The information collection requirements in this interim rule are being resubmitted for approval under OMB Control Number 9000-0103, as required by 44 U.S.C. 3501, et seq. Annual reporting burden: The annual reporting burden is estimated as follows:

Respondents, 20,000; responses per respondent, 20; total annual responses, 400,000; hours per response, 5 minutes; and total response burden hours, 33,333. Annual recordkeeping burden: The annual recordkeeping burden with respect to incorporating the training requirement into training programs is estimated as follows: Respondents, 20,000; responses per respondent, 20; total annual responses, 400,000; hours per response, 20 minutes; and total response burden hours, 13,333. Any public comments concerning the information collection requirements should be submitted to the Office of Management and Budget (OMB), Mr. Stephen Holden, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

List of Subjects in 48 CFR Parts 3, 4, 9, 14, 15, 37, 52, and 53

Government procurement.

Dated: August 31, 1990.

Albert A. Vicchiolla,
Director, Office of Federal Acquisition Policy.

Federal Acquisition Circular

[Number 84-60]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-60 is effective September 6, 1990.

Eleanor Spector,
Deputy Assistant Secretary of Defense for Procurement.

Richard H. Hopf,
Associate Administrator for Acquisition Policy.

S.J. Evans,
Assistant Administrator for Procurement, NASA.

The Administrator of the Office of Federal Procurement Policy, Office of Management and Budget, and the Director, Office of Government Ethics, concur.

Allan V. Burman,
Administrator, Office of Federal Procurement Policy.

Dated: August 27, 1990.

Stephen D. Potts,
Director, Office of Government Ethics.

Federal Acquisition Circular (FAC) 84-60 amends the Federal Acquisition Regulation as specified below:

Item—procurement Integrity

On November 17, 1988, section 6 of the Office of Federal Procurement Policy (OFPP) Act Amendments of 1988 amended the OFPP Act by adding section 27, Procurement Integrity, codified at section 423 of title 41 of the United States Code. An interim rule was

published on May 11, 1989, in the Federal Register (54 FR 29488) followed by a 60-day public comment period. In November 1989, section 27 was amended by section 814 of Pub. L. 101-189 and subsequently suspended by section 507 of the Ethics Reform Act of 1989, Pub. L. 101-194, for the period December 1, 1989, through November 30, 1990. This interim rule replaces the coverage previously promulgated in FAC 84-47 and incorporates coverage resulting from public comments, the public law, and the suspension of section 27.

The Act prohibits certain activities by competing contractors and Government procurement officials during the conduct of a Federal agency procurement. In general, these prohibited activities involve soliciting or discussing post-Government employment, offering or accepting a gratuity, or soliciting or disclosing proprietary or source selection information.

The Act also contains certification and disclosure provisions for both contractors and Government officers, imposes post-employment restrictions on Government officers and employees, and provides for criminal and civil penalties, and administrative, and contractual remedies for violations of the Act.

Section 814 of Public Law 101-189 amended the procurement official certification provisions in section 27 of the Act. The amendment will require agencies to obtain new certifications from individuals who will be performing procurement official activities on or after December 1, 1990.

Solicitations issued for which contract award is expected on or after December 1, 1990, shall incorporate the solicitation provisions and contract clauses required by 3.104-10 of this interim rule. Contract award may not be made on or after December 1, 1990, unless the offeror and contracting officer have completed the certification required by 3.104-9 (b) and (c), respectively.

Solicitations contemplating contract award prior to December 1, 1990, are not required to incorporate the provisions and contract clauses required by 3.104-10. The statutory requirements of the OFPP Act as amended and this interim rule do not apply to such procurements.

However, if an award contemplated to be made before December 1, 1990, is not made by November 30, 1990, the contracting officer shall:

(1) For sealed bid procurements, if bids have not been opened, amend the solicitation;

(2) For procurements using other than sealed bidding procedures, or for sealed

bid procurements, where bids have been opened, the apparent successful offeror shall be required to complete the certification required by 3.104-9. The clauses at 52.203-9 and 52.203-10 and, if applicable, the clause at 52.203-13, shall be incorporated into any resultant contract prior to contract award.

FAR 3.104-1 through 3.104-12, 4.802(e), 9.106(b), 14.211(a), 15.413-1, 15.508(b), 15.509 (d) and (f)(9), 15.610, 15.612(e), 15.805-5(k), 37.207, the provision at 52.203-8, the clauses at 52.203-9 and 52.203-10, and 53.203 are revised; 37.208 and the clause at 52.239-9 are removed; 15.413, 15.413(f)(6), 15.608(b)(5), 37.103(c), the clause at 52.203-13, and the Optional Form 333 in 53.302-333 are added. The form has been authorized for local reproduction. A copy of the form is provided in the looseleaf edition for the user to reproduce as required.

Therefore, 48 CFR parts 3, 4, 9, 14, 15, 37, 52, and 53 are amended as set forth below:

1. The authority citation for 48 CFR parts 3, 4, 9, 14, 15, 37, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Sections 3.104 and 3.104-1 through 3.104-12 are revised to read as follows:

3.104 Procurement integrity.

3.104-1 General.

(a) Section 3.104 implements section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) as amended by section 814 of Public Law 101-189 (hereinafter referred to as "the Act"). Agency supplementation of 3.104 and any clauses required by 3.104 must be approved at a level not lower than the Senior Procurement Executive of the agency, unless a higher level of approval is required by law for that agency.

(b) Agency employees are reminded that much of the conduct prohibited by the Act is also prohibited by other statutes and regulations. For example—

(1) The offer or acceptance of a bribe or gratuity is prohibited by 18 U.S.C. 201, 10 U.S.C. 2207, 5 U.S.C. 7353, and 5 CFR parts 735 and 2635;

(2) Employment discussions are covered by 18 U.S.C. 208, which precludes a Government employee from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is negotiating for employment;

(3) Post-employment restrictions are covered by 18 U.S.C. 207, which

prohibits certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract on which the former employee worked while employed by the Government; and

(4) FAR parts 14 and 15, which place restrictions on the release of information related to procurements and other contractor information which must be protected under 18 U.S.C. 1905. In addition, 5 CFR part 735 protects non-public Government information.

3.104-2 Applicability.

This subsection implements section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) (OFPP Act) as amended by section 814 of Public Law 101-189. Conduct and procurement activities on or after July 16, 1989, are subject to the prohibitions and restrictions of section 27 as follows:

(a) Conduct and procurement activities occurring during the period from July 16, 1989 through November 30, 1989, are subject to the prohibitions and restrictions in section 27 of the Office of Federal Procurement Policy Act as originally enacted on November 17, 1988, and as implemented by Federal Acquisition Circular 84-47 (see 48 CFR 3.104 through 3.104-12, 4.802(e), 9.105-3(c), 9.106-3(b), 15.805-5 (l) and (m), 37.207(f), 37.208, 43.106, 52.203-8 through 52.203-10 and 52.237-9, October 1, 1989 edition). In addition, the performance of procurement activities during the period from July 16, 1989 through November 30, 1989, may subject an individual to prohibitions and restrictions applicable after December 1, 1990, as provided in subparagraphs (c)(1) and (c)(2) of this subsection.

(b) Section 27 of the OFPP Act was suspended from December 1, 1989, through November 30, 1990. The prohibitions and restrictions under section 27, either as originally enacted or as amended, do not apply during the suspension period. In addition, an individual does not become a procurement official under section 27 as originally enacted or as amended if the individual's participation in a procurement was solely during the suspension period. The suspension does not interrupt the running of the 2-year period of any post-employment restriction that attached during the period from July 16, 1989, through November 30, 1989.

(c) Conduct and procurement activities occurring on or after December 1, 1990, are subject to section 27 of the amended law. In addition:

(1) For procurements begun prior to December 1, 1989, which have not been completed by November 30, 1990, the

prohibitions on gratuities, employment discussions, and soliciting, obtaining, or disclosing proprietary or source selection information under subsections 27 (b) and (d), of the amended law, apply on or after December 1, 1990, to an individual who was a procurement official under section 27, as originally enacted, and whose activities prior to December 1, 1989, would meet the definition of a procurement official under section 27, of the amended law.

(2) The post-employment restrictions of subsection 27(f), of the amended law, apply on or after December 1, 1990, to an individual who was a procurement official under section 27, as originally enacted, and whose activities prior to December 1, 1989, would meet the definition of a procurement official under section 27, of the amended law, provided that the 2-year period of the restrictions has not expired.

3.104-3 Statutory prohibitions and restrictions.

As provided in section 27 of the Act, the following conduct is prohibited:

(a) *Prohibited conduct by competing contractors (subsection 27(a) of the Act).* During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly—

(1) Make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency, except as provided in 3.104-6(b);

(2) Offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

(3) Solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

(b) *Prohibited conduct by procurement officials (subsection 27(b) of the Act).* During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—

(1) Solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or

consultant of a competing contractor, except as provided in 3.104-6(a);

(2) Ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or

(3) Disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(c) *Disclosure to unauthorized persons (subsection 27(d) of the Act).* During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to proprietary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

(d) *Restrictions resulting from procurement activities of Government officers or employees who are or were procurement officials (subsection 27(f) of the Act).* (1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—

(i) Participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement; or

(ii) Participate personally and substantially on behalf of the competing contractor in the performance of such contract.

The restrictions in subdivisions (d)(1)(i) and (d)(1)(ii) of this subsection apply during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

(2) This subsection does not apply to any participation referred to in subdivisions (d)(1)(i) and (d)(1)(ii) of this subsection with respect to a subcontractor who is a competing contractor unless—

(i) The subcontractor is a first or second tier subcontractor and the

subcontract is for an amount that is in excess of \$100,000; or

(ii) The subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract; or

(iii) The procurement official involved in the award, modification, or extension of the prime contract personally directed or recommended the particular subcontractor to the prime contractor as a source for the subcontract; or

(iv) The procurement official personally reviewed and approved the award, modification, or extension of the subcontract.

3.104-4 Definitions.

As used in this subsection—

(a) *Agency ethics official* means the designated agency ethics official described in 5 CFR 2638.201 and any other person, including deputy ethics officials described in 5 CFR 2638.201, to whom authority under 3.104-6(f) and 3.104-8(e) has been delegated by the designated agency ethics official.

(b)(1) *Competing contractor*, with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services means any entity (such as an individual, partnership, corporation, educational institution, nonprofit or not for profit organization, or business unit) legally capable of entering into a contract or subcontract in its own name that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

(2) The term "competing contractor" includes the incumbent contractor in the case of a contract modification.

(3) An entity shall not be considered a competing contractor whenever, by action of the Government or the entity, it is clear that the entity will not, or will no longer, participate in a particular procurement.

(4) For purposes of subsections 27(a) and 27(b) of the Act, the phrase "representative, agent, or consultant of a competing contractor" means any entity, other than an officer or employee of a competing contractor, acting on behalf of, or providing advice to, a competing contractor with regard to a particular Federal agency procurement.

(c)(1) *During the conduct of any Federal agency procurement of property or services* means, except for broad agency announcements, small business innovative research programs, and unsolicited proposals (see subparagraphs (c)(3) and (c)(4) of this subsection), the period beginning on the

earliest date upon which an identifiable, specific action is taken for the particular procurement and concluding upon the award or modification of a contract or the cancellation of the procurement; provided, however, that in no event shall the conduct of the procurement be deemed to have begun prior to the decision by an authorized agency official to satisfy a specific agency need or requirement by procurement. These actions are—

(i) Drafting a specification or a statement of work;

(ii) Review and approval of a specification;

(iii) Requirements computation at an inventory control point;

(iv) Development of procurement or purchase requests;

(v) Preparation or issuance of a solicitation;

(vi) Evaluation of bids or proposals;

(vii) Selection of sources;

(viii) Conduct of negotiations; or

(ix) Review and approval of the award of a contract or contract modification.

(2) Each contract award and each contract modification constitutes a separate procurement action, i.e., a separate period to which the prohibitions and the requirements of the Act apply.

(3) For broad agency announcements and small business innovative research programs, each proposal received by an agency shall constitute a separate procurement for purposes of the Act. The conduct of each procurement shall be deemed to have begun upon the date a Commerce Business Daily announcement was made regarding the availability of the broad agency announcement or the date a solicitation was released for the small business innovative research program. The conduct of the procurement shall end upon the award of a contract or contract modification incident to each proposal or the written rejection of each specific proposal.

(4) Each unsolicited proposal shall be considered a separate procurement for purposes of the Act. For unsolicited proposals, the conduct of the procurement shall be deemed to have begun upon the publication date of a general statement of agency needs (see 15.503(d)), or if an agency does not publicize a general statement of agency needs, upon the provision of advance guidance related to agency needs (see 15.504(a)(1)) or the receipt of the unsolicited proposal, whichever is earlier. The conduct of the procurement shall end upon the award of a contract

or contract modification or the rejection of the proposal.

(d) *Government officer or employee* means a person who is employed by a Federal agency (see subpart 2.1) and who is in such status during the period July 16, 1989 through November 30, 1989, or on or after December 1, 1990. This includes—

(1) A member of the uniformed services as defined in section 101(3) of title 37, United States Code;

(2) A person who is appointed to a position in the Federal Government under title 5, United States Code, or any other title authorizing such appointments, including a person under a temporary appointment; and

(3) A special Government employee as defined in section 202 of title 18, United States Code.

(e) *Modification* means the addition of new work to a contract, or the extension of a contract, which requires a justification and approval (see subpart 6.3). It does not include an option where all the terms of the option, including option prices, are set forth in the contract and all requirements for option exercise have been satisfied, change orders, administrative changes, or any other contract changes that are within the scope of the contract.

(f)(1) *Gratuity or other thing of value* includes any gift, favor, entertainment, or other item having monetary value. The phrase includes services, conference fees, vendor promotional training, transportation, lodgings and meals, as well as discounts not available to the general public and loans extended by anyone other than a bank or financial institution. The phrase does not include—

(i) Anything for which market value is paid by the procurement official, or on his behalf, by someone other than a competing contractor, or a representative, agent, or consultant of the competing contractor;

(ii) Anything which is paid for by the Government, secured under Government contract, or accepted by the Government under specific statutory authority;

(iii) Plaques or certificates having no intrinsic value; or

(iv) Any unsolicited item, other than money, having a market value of \$10 or less per event or presentation.

For these purposes, market value means the retail cost the procurement official would incur to purchase the item and, in the case of items such as tickets, refers to their face value. A thing of value given or received or otherwise offered or sought "directly or indirectly" includes a thing of value directed to a person other

than a procurement official, such as a spouse or child, solely because of that person's relationship to the procurement official or on the basis of designation, recommendation, or suggestion by the procurement official.

(2) Promotional vendor training does not include training provided by a vendor when a vendor's products are furnished under contract to the Government and the training is to facilitate the use of those products.

(g) *Participated personally and substantially* means active and significant involvement of the individual in activities directly related to the procurement. To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the supervisor in the matter. To participate "substantially" means that the employee's involvement must be of significance to the matter. For example, the review of procurement documents solely to determine compliance with applicable regulatory, administrative, or budgetary requirements or procedures does not constitute substantial participation in a procurement. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial.

(h)(1) *Procurement official* means any civilian or military official or employee of an agency who has participated personally and substantially in any of the following activities for a particular procurement—

(i) Drafting a specification or a statement of work for that procurement;

(ii) Review and approval of a specification or statement of work developed for that procurement;

(iii) Preparation or development of procurement or purchase requests for that procurement;

(iv) The preparation or issuance of a solicitation for that procurement;

(v) Evaluation of bids or proposals for that procurement;

(vi) Selection of sources for that procurement;

(vii) Negotiations to establish the price or terms and conditions of a particular contract or contract modification; or

(viii) Review and approval of the award of a contract or contract modification.

(2) For purposes of 3.104-4(h), the term "employee of an agency" includes a contractor, subcontractor, consultant, expert, or advisor (other than a competing contractor) acting on behalf of, or providing advice to, the agency with respect to any phase of the agency procurement concerned.

(3) Generally, an individual will not become a procurement official solely by participating in the following activities—

(i) Federal advisory committees that are established and function in accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 2, unless the Federal advisory committee is established or used for the purpose of performing a function listed in subparagraph (h)(1) of this subsection and the individual member's participation in that function is personal and substantial;

(ii) Agency level boards, panels, or other advisory committees that review program milestones or evaluate and make recommendations regarding alternative technologies or approaches for satisfying broad agency level missions or objectives;

(iii) The performance of general, technical, engineering, or scientific effort having broad application not directly associated with a particular procurement, notwithstanding that such general, technical, engineering, or scientific effort subsequently may be incorporated into a particular procurement;

(iv) Clerical functions supporting the conduct of a particular procurement; and

(v) For procurements to be conducted under the procedures of OMB Circular A-76, participation in management studies, preparation of in-house cost estimates, preparation of "most efficient organization" analyses, and furnishing of data or technical support to be used by others in the development of performance standards, statements of work, or specifications.

(4) An employee of an agency does not become a procurement official for a particular procurement until the onset of the employee's personal and substantial participation in that particular procurement.

(i) *Property* means supplies as defined in 2.101.

(j)(1) *Proprietary information* means information contained in a bid or proposal or otherwise submitted to the Government by a competing contractor in response to the conduct of a particular Federal agency procurement, or in an unsolicited proposal, that has been marked by the competing

contractors as proprietary information in accordance with applicable law and regulation.

(2) Information shall be considered proprietary information, for purposes of section 27 of the Act, only when—

(i) An attached transmittal document, such as a cover page or the label of a magnetic media storage container, is clearly marked with a restrictive legend; and

(ii) The specific portions of the information whose disclosure the competing contractor desires to restrict are clearly and separately marked.

(3) Proprietary information does not include information—

(i) That is otherwise available without restrictions to the Government, another competing contractor, or the public;

(ii) Contained in bid documents following bid opening (but see 14.404-4); or

(iii) That the contracting officer determines to release in accordance with 3.104-5(d).

(k)(1) *Source selection information* is information, including information stored in electronic, magnetic, audio or video formats, which is prepared or developed for use by the Government to conduct a particular procurement and—

(i) The disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

(ii) Is required by statute, regulation, or order to be secured in a source selection file or other facility to prevent disclosure.

(2) Source selection information is limited to—

(i) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices prior to public bid opening;

(ii) Proposed costs or prices submitted in response to a Federal agency solicitation (for other than sealed bids), or lists of those proposed costs or prices;

(iii) Source selection plans;

(iv) Technical evaluation plans;

(v) Technical evaluations of proposals;

(vi) Cost or price evaluations of proposals;

(vii) Competitive range determinations which identify proposals that have a reasonable chance of being selected for award of a contract;

(viii) Rankings of bids, proposals, or competitors;

(ix) The reports and evaluations of source selection panels or boards or advisory councils; or

(x) Other information marked as "SOURCE SELECTION INFORMATION—SEE FAR 3.104" based upon a case-by-case

determination by the Head of the Agency, his designee, or the contracting officer that the information meets the standards in subdivisions (k)(1) (i) and (ii) of this subsection.

(1) *Possible violation* means, for purposes of the certification requirements under 3.104-9, specifically identified or documented circumstances that provide a reasonable basis to believe that a violation of the Act may have occurred. Rumor and hearsay are not, by themselves, a reasonable basis to conclude that a possible violation exists.

3.104-5 Disclosure, protection, and marking of proprietary and source selection information.

(a) Except as specifically provided for in this subsection, no person or other entity may disclose proprietary or source selection information to any person other than a person authorized by the Head of the Agency to receive such information. A person or entity who does not know if information is proprietary or source selection information, or does not know if the person or entity may disclose or receive such information, shall make the inquiries prescribed at 3.104-9(d).

(b)(1) Proprietary and source selection information shall be protected from unauthorized disclosure in accordance with 14.401, 15.411, 15.413, applicable law, and agency regulations.

(2) Information contained in a bid or proposal that bears the legend required by 3.104-4(j)(2) shall be considered to be proprietary information for purposes of the Act. However, information contained in a bid or proposal that does not bear that legend shall remain subject to the restrictions on disclosure contained in 15.413, 15.509, 24.202, or as otherwise required by law.

(c) In determining whether particular information is source selection information under 3.104-4(k)(2)(x), the originator shall assure that the information meets the criteria in 3.104-4(k)(1) and consult with agency officials as appropriate. Individuals responsible for preparing material that may include information designated as source selection information in accordance with 3.104-4(k)(2)(x) shall mark the cover page and each page that contains source selection information with the legend "SOURCE SELECTION INFORMATION—SEE FAR 3.104." Although the material described in 3.104-4(k)(2) (i) through (ix) is considered to be source selection information whether or not marked, all reasonable efforts shall be made to mark such material with this legend.

(d)(1) The head of the agency, or his or her designee, or the contracting officer, has the authority, in accordance with applicable agency regulations or procedures, to authorize persons, or classes of persons, to receive proprietary or source selection information when necessary to the conduct of the procurement.

(2) For contracts and contract modifications in excess of \$100,000, the head of the agency, or his or her designee, shall establish procedures to assure that the names of all persons, identification of the classes of persons and, to the maximum extent practicable the names of all individuals within a class of persons, authorized access to proprietary or source selection information at the contracting activity are listed in the contract file.

(3) For contracts and contract modifications expected to exceed \$100,000, if proprietary or source selection information is authorized to be released to Government activities outside the contracting activity responsible for the conduct of the procurement, the head of the office receiving the information, or his or her designee, shall maintain a list of persons, a list of classes of persons and, to the maximum extent practicable, the names of all individuals within classes of persons, who have been authorized access to the proprietary or source selection information. The list shall be forwarded to the contracting office responsible for the conduct of the procurement to be included in the contract file.

(4) For release to other than Government employees, see 15.413-2. The names of those individuals shall also be listed in the contract file when the contract or contract modification is expected to exceed \$100,000.

(5) The lists prescribed by this subsection shall be forwarded to the contracting officer for inclusion in the contract file within the time specified by the contracting officer.

(e)(1) Except as provided in subparagraph (e)(4) of this subsection, if the contracting officer believes that information marked as proprietary (see 3.104-4(j)) is not proprietary, the competing contractor that has affixed the marking shall be notified in writing and given an opportunity to justify the proprietary marking. If the competing contractor agrees that the material is not proprietary information, or does not respond within the time specified in the notice, the contracting officer may remove the proprietary marking and the information may be released.

(2) After reviewing any justification submitted by the competing contractor, if the contracting officer determines that the proprietary marking is not justified, the contracting officer shall so notify the competing contractor in writing.

(3) Information marked by the competing contractor as proprietary shall not be released until—

(i) The review of the contractor's justification has been completed; or

(ii) The period specified for the contractor's response has elapsed, whichever is earlier.

Thereafter, the contracting officer may release the information.

(4) With respect to technical data that are marked proprietary by a competing contractor, the contracting officer shall generally follow the procedures in 27.404(h).

(f) Nothing in 3.104 prohibits competing contractors from disclosing or authorizing the Government to disclose their company-specific proprietary information to any other person or entity where not otherwise prohibited by law.

(g) Proprietary markings under 3.104 do not limit the Government's use of technical data to which the Government has rights.

(h) Source selection or proprietary information that is properly in the possession of a competing contractor as a result of a prior disclosure that was not prohibited by the Act shall not be considered to have been solicited or obtained, directly or indirectly, in violation of the Act.

(i) Nothing in 3.104 shall be construed to authorize the withholding of any information pursuant to a proper request from the Congress, any committee or subcommittee thereof, a Federal agency, any board of contract appeals of a Federal agency, the Comptroller General, or an Inspector General of a Federal agency, except as otherwise authorized by law or regulation. Any such release which contains proprietary or source selection information shall clearly notify the recipient that the information or portions thereof are proprietary or source selection information related to the conduct of a Federal agency procurement whose disclosure is restricted by section 27 of the Act.

3.104-6 Restrictions on employment or business opportunity discussions between competing contractors and procurement officials.

(a) *Applicability to procurement officials.* During the conduct of a Federal agency procurement, subsection 27(b)(1) of the Act prohibits an individual who has become a procurement official from knowingly,

directly or indirectly, soliciting or accepting from or discussing with any officer, employee, representative, agent, or consultant of a competing contractor, future employment or business opportunity. Subsection 27(b)(1) of the Act also applies to individuals acting as procurement officials on behalf of the procuring agency who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors (other than employees of a competing contractor). The prohibition in subsection 27(b)(1) does not apply to a procurement official—

(1) After the contract has been awarded, the procurement canceled, or the contract modification has been executed;

(2) After the procurement official leaves Government service;

(3) Who is, or is employed by, a contractor, subcontractor, consultant, expert, or advisor, after such procurement official ceases to act on behalf of, or provide advice to, the procuring agency concerning the procurement;

(4) Described in paragraph (c) of this subsection who has received written authorization for recusal from further participation in a procurement, and who has in fact discontinued participation in the procurement.

(5) Whose only communication with a competing contractor is for the purpose of—

(i) Rejecting an unsolicited offer of employment or business opportunity; or

(ii) Advising the competing contractor that he or she must seek recusal in accordance with paragraph (d) of this subsection prior to any discussions regarding the unsolicited offer. A procurement official who wishes to conduct such discussions with the competing contractor shall promptly submit a recusal proposal.

(b) *Applicability to competing contractors.* During the conduct of a Federal agency procurement, subsection 27(a)(1) of the Act prohibits a competing contractor from knowingly, directly or indirectly, offering or promising to, or discussing with, a procurement official any future business or employment opportunity. The prohibition does not apply to—

(1) An initial contact for the sole purpose of determining whether an individual or other entity is able to engage in discussions concerning future employment or business opportunity either because the individual or entity has been recused or is not a procurement official.

(2) A contact or discussion with an individual or other entity who may engage in such contact or discussion

under subparagraphs (a)(1) through (a)(4) of this subsection.

(c) *Eligibility for recusal.* An individual or other entity who is a procurement official may be eligible for recusal if the individual or entity has not participated personally and substantially in—

(1) The evaluation of bids or proposals, the selection of sources, or the conduct of negotiations in connection with such solicitation or contract during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract or cancellation of a procurement; or

(2) The evaluation of a proposed modification, or the conduct of negotiations during the period beginning with the negotiation of a modification of a contract and ending with an agreement to modify the contract or a decision not to modify the contract.

(d) *Recusal proposal.* An eligible procurement official who wishes to discuss future employment or business opportunities with a competing contractor during the conduct of a procurement shall submit to the Head of the Contracting Activity (HCA), or his or her designee, prior to initiating or engaging in such discussions, a written proposal of disqualification from further participation in the procurement which relates to that competing contractor. Concurrent copies of the written proposal shall be submitted to the contracting officer, the Source Selection Authority if the contracting officer is not the Source Selection Authority, and the procurement official's immediate supervisor. As a minimum, the proposal shall—

(1) Identify the procurement involved;

(2) Describe the nature of the procurement official's participation in the procurement and specify the approximate dates or time period of participation; and

(3) Identify the competing contractor and describe its interest in the procurement.

(e) *Suspension from participation in a procurement.* The contracting officer, or the Source Selection Authority if the contracting officer is not the Source Selection Authority, may suspend the individual's or entity's participation in the procurement pending evaluation of the recusal proposal. Notwithstanding submission of a recusal proposal or suspension from participation in a procurement, an individual or entity shall not solicit or engage in discussions of employment or business opportunity until authorized in writing by the HCA or his or her designee.

(f) *Evaluation of recusal proposal.* (1) If the HCA or his or her designee determines that the procurement official's further participation is not essential to the activity's conduct of the procurement and that recusal will not jeopardize the integrity of the procurement process, the HCA may, after consulting with the agency ethics official, grant written approval of the recusal proposal. In evaluating the recusal proposal, the HCA or his or her designee may consider any relevant factors, including—

(i) The importance of the procurement official's role to the completion of the procurement action;

(ii) The procurement official's prior participation in key procurement decisions and actions;

(iii) The timing of the proposal in relation to significant procurement milestones; and

(iv) Potential disruption to the procurement schedule as a result of the procurement official's recusal.

(2) The HCA or his or her designee may request that any person, including the procurement official, the Source Selection Authority, the contracting officer or the procurement official's immediate supervisor, provide any additional information necessary to evaluate the recusal proposal.

(3) Any rejection of the recusal proposal shall be in writing and shall state the basis for rejection. A determination by the HCA or his or her designee to reject a recusal proposal shall be final. Rejection of a Government officer's or employee's recusal proposal shall not be deemed to be an adverse personnel action or be subject to agency or negotiated grievance procedures.

(g) *Duration of recusal.* A procurement official whose recusal proposal has been approved shall be disqualified—

(1) As a minimum, for any period during which future employment or business opportunities with the competing contractor have not been rejected by either the procurement official or the competing contractor; or

(2) For the period the procurement official and competing contractor have an employment or business relationship or an arrangement concerning future employment or business relationships.

(h) *Reinstatement to participation in a procurement.* Subsequent to a period of disqualification, if an agency wishes to reinstate the procurement official to participation in the procurement, the HCA or his or her designee may authorize immediate reinstatement or, in his or her discretion, may authorize reinstatement following whatever

additional period of disqualification he or she determines is necessary to ensure the integrity of the procurement process. It is within the discretion of the HCA, or his or her designee, to determine that the procurement official shall not be reinstated to participation in the procurement. In determining that any additional period of disqualification is necessary, the HCA or his or her designee shall consider any factors that might give rise to an appearance that the procurement official acted without complete impartiality with respect to issues involved in the procurement.

3.104-7 Postemployment restrictions applicable to Government officers and employees serving as procurement officials and certifications required from procurement officials leaving Government service.

(a) Subsection 27(e)(4) of the Act provides that if a procurement official leaves the Government during the conduct of a procurement expected to result in a contract or modification in excess of \$100,000, such official shall certify to the contracting officer that he or she understands the continuing obligation, during the conduct of the procurement, not to disclose propriety or source selection information related to such agency procurement. This certification requirement also applies to individuals acting as procurement officials on behalf of the procuring activity who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors other than employees of the competing contractor when such individuals, during the conduct of the procurement, cease to function as procurement officials for the procurement.

(b) Subsection 27(f)(1)(A) of the Act prohibits a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating in any manner in negotiations as an officer, employee, representative, agent, or consultant of a competing contractor leading to the award or modification of the contract for such procurement. This restriction not only includes representing the competing contractor in negotiations with the contracting activity, but also includes providing advice or information for the specific purpose of influencing negotiation strategies. For purposes of this restriction, "negotiation strategies" mean the contractor's approach to the preparation and presentation of its offer or the conduct of negotiations with the Government. This restriction does not apply to providing scientific, technical,

or other advice that is unrelated to negotiation strategies. This restriction lasts for 2 years from the date of the individual's last personal and substantial participation in the Federal agency procurement.

(c) Subsection 27(f)(1)(B) of the Act prohibits a current or former Government officer or employee, as defined in 3.104-4(d), who was a procurement official with respect to a particular procurement, from knowingly participating personally and substantially on behalf of the competing contractor in performance of the contract. To participate "personally and substantially" requires the presence of both direct and significant involvement in the performance of the specific contract. The performance of general engineering, scientific or technical work, or providing general budgetary or policy advice, shall not be considered personal and substantial participation on behalf of a competing contractor in the performance of the contract for which the Government officer or employee is or was a procurement official. Where participation is on behalf of a competing contractor who is a subcontractor, the significance of that participation will be determined in relation to the prime contract. This restriction lasts for 2 years from the date of the last personal and substantial participation in the Federal agency procurement.

(d) The restrictions in paragraphs (b) and (c) of this subsection do not apply to—

(1) Individuals acting as procurement officials on behalf of the procuring agency who are or were, or who are or were employed by, contractors, subcontractors, consultants, experts, or advisors and who are not Government officers or employees as defined in 3.104-4(d).

(2) Participation in the negotiation or performance of any other contract of the competing contractor.

(3) General scientific and technical work on an independent research and development project, unless such work involves the negotiation or performance of a specific contract that the individual worked on as a Government employee.

(4) Participation with respect to a subcontractor who is a competing contractor unless—

(i) The subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of \$100,000; or

(ii) The subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract; or

(iii) The procurement official involved in the award or modification of the prime contract personally directed or recommended the particular subcontractor as a source for the subcontract; or

(iv) The procurement official personally reviewed and approved the award or modification of the subcontract. A contracting officer's consent, in accordance with part 44, to the placement of a subcontract or, with respect to architect-engineer contracts, the substitution of a subcontractor, associate, or consultant, does not constitute approval of the subcontract, subcontractor, associate, or consultant. Similarly, approval of a contractor's purchasing system does not constitute approval of a particular subcontract or subcontractor.

(5) An individual who has been granted a waiver by the President in accordance with subsection 27(f)(3) of the Act. Waivers under that subsection may be granted only to a civilian officer or employee of the Executive Office of the President who, after his or her Federal Government employment is terminated, is or will be engaged in activities at a Government-owned, contractor-operated entity at which he or she served as an officer or employee immediately before his or her Federal Government employment began.

(6) An individual whose only personal and substantial participation in the procurement occurred during the period December 1, 1989, through November 30, 1990.

3.104-8 Knowing violations, duty to inquire, and ethics advisory opinions.

(a) *Knowing violations.* Neither a procurement official nor a competing contractor violates the restrictions set forth in 3.104-3 unless the prohibited conduct is engaged in knowingly. For these purposes, conduct is not "knowing" when—

(1) A competing contractor engages in specific conduct after having satisfied the duty to inquire under paragraphs (b), (c), and (d) of this subsection, or when the competing contractor engages in conduct based upon good faith reliance on an agency ethics advisory opinion issued to a current or former procurement official under paragraph (e) of this subsection.

(2) A procurement official engages in specific conduct after having satisfied the duty to inquire under paragraphs (b), (c), and (d) of this subsection or has acted in good faith reliance on an ethics advisory opinion obtained under paragraph (e) of this subsection.

(b) *Duty to inquire—general.* (1) For some procurements, neither competing

contractors nor all procurement officials will have knowledge as to when the conduct of a particular procurement has begun. However, certain conduct and activities that are prohibited by the Act would be inappropriate at any time. There are prohibitions on the receipt of gratuities from agency contractors that apply without regard to whether an employee is involved in the conduct of a particular procurement. Similarly, potential contractors should not solicit, and agency personnel should not offer, proprietary or source selection information at any time. However, potential contractors may offer, and Government employees may solicit, employment except as prohibited by law.

(2) Agency personnel shall be presumed to know the procurements for which they are procurement officials. Contractor personnel are presumed to know the procurements for which the organization they represent is reasonably likely to be competing. Individuals who do not know whether they are procurement officials, or whether the organization they represent is or is reasonably likely to become a competing contractor, should defer any discussions regarding employment until these questions are resolved by consulting appropriate parties within their respective organizations. Agency personnel who cannot ascertain, after discussions with the contracting officer, or the Source Selection Authority if the contracting officer is not the Source Selection Authority, whether they are procurement officials, may request an ethics advisory opinion under paragraph (e) of this subsection for purposes of determining their status.

(b) *Duty to inquire—employment discussions.* (1) A contractor who wishes to discuss employment opportunities with an individual whose duties and functions may make that individual a procurement official (see 3.104-4(h)) should ask if that individual is a procurement official for a procurement for which the contractor is a competing contractor or is likely to become a competing contractor before conducting any discussion related to employment. A competing contractor shall not be considered to have knowingly violated the prohibitions set forth in subsection 27(a)(1) of the Act (see 3.104-3(a)(1)) if the contractor has made an inquiry in good faith of the possible procurement official and has been advised that the individual is not a procurement official for any procurement for which the contractor is or is reasonably likely to become a competing contractor, or is advised that the procurement official has been

recused from participation in the procurement in accordance with 3.104-6.

(2) A procurement official may not solicit or engage in employment or business opportunity discussions with a competing contractor or a contractor who is reasonably likely to become a competing contractor unless the procurement official has been recused from participation in the procurement in accordance with the procurements at 3.104-6.

(3) A procurement official who wishes to solicit employment from, or discuss employment with, a contractor and does not know if the contractor is or is reasonably likely to become a competing contractor should ask whether the contractor is or is reasonably likely to become a competing contractor on any procurement for which the individual is serving as a procurement official. The procurement official—

(i) May rely on the contractor's representation that it is not or is not likely to become a competing contractor, and enter into employment or business opportunity discussions with that contractor; or

(ii) Shall not, if the contractor represents that it is or is reasonably likely to become a competing contractor, enter into employment or business opportunity discussions with that contractor. If the procurement official is an eligible procurement official as defined at 3.104-6(c), and desires to pursue discussions with that contractor, the procurement official must first seek and obtain written authorization for recusal in accordance with the procedures at 3.104-6 before entering into further discussions with that contractor.

(4) A procurement official shall not be considered to have knowingly violated the prohibitions set forth in subsection 27(b)(1) of the Act (see 3.104-3(b)(1)) if—

(i) The procurement official has made inquiry in good faith of the potential contractor, and has been advised that the contractor is not or will not be a competing contractor on a procurement under the responsibility of the procurement official; or

(ii) The procurement official has been recused from participation in the procurement.

(d) *Duty to inquire—proprietary and source selection information.* (1) A competing contractor shall not be considered to have knowingly violated the prohibitions in subsection 27(a)(3) of the Act (see 3.104-3(a)(3)) if, before proprietary or source selection information was solicited or obtained, the contractor—

(i) Had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) regarding whether information was proprietary or source selection information; and

(ii) Had been advised by such official that the information was not proprietary or source selection information.

(2) A procurement official shall not be considered to have knowingly violated the prohibitions in subsection 27(b)(3) of the Act (see 3.104-3(b)(3)) if, prior to disclosing information, the procurement official had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) and had been advised that—

(i) The information was not proprietary or source selection information; or

(ii) The information is proprietary or source selection information and the individual to whom the procurement official wishes to disclose the information has been authorized access to such information by the Head of the Agency or the contracting officer.

(3) No person who is given authorized or unauthorized access to proprietary or source selection information shall be considered to have knowingly violated the prohibition in subsection 27(d) or the Act (see 3.104-3(c)) if, before disclosing such information, the person:

(i) Had made an inquiry in good faith of the contracting officer (or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee) as to whether or not the individual to whom he seeks to disclose the proprietary or source selection information has been authorized access to such information by the Head of the Agency or the contracting officer; and

(ii) Had been advised by such official that such individual has been so authorized.

(e) *Ethics advisory opinions.* (1) An employee or former employee of an agency who is or was a procurement official may request an ethics advisory opinion from the agency ethics official as to whether specific conduct which has not yet occurred would violate section 27 of the Act. An individual who cannot determine, after discussions with the contracting officer (see subparagraph (b)(2) of this subsection), if he or she is or was a procurement official may request an ethics advisory opinion for the purpose of determining his or her status. Ethics advisory opinions may not be obtained, however,

for the purpose of establishing whether—

(i) Prior to bid opening or receipt of proposals, a particular contractor is a competing contractor;

(ii) Items of information constitute proprietary or source selection information as defined in 3.104-4; or

(iii) Proprietary or source selection information may be disclosed.

Questions regarding proprietary and source selection information shall be referred to the contracting officer or, if a contracting officer has not been appointed, the Head of the Agency or his or her designee (see subparagraphs (d)(1) through (d)(3) of this subsection). Questions regarding a contractor's status as a competing contractor shall be resolved in accordance with subparagraph (c)(3) of this subsection.

(2) The request for an advisory opinion shall be submitted in writing, shall be dated and signed, and shall include all information reasonably available to the procurement official or former procurement official that is relevant to the inquiry. As a minimum, the request shall include—

(i) Information about the procurement in which the individual was or is involved, including contract or solicitation numbers, dates of solicitation or award, and a description of the goods or services procured or to be procured;

(ii) Information about the individual's participation in the procurement, including the dates or time periods of that participation, and the nature of the individual's duties or responsibilities;

(iii) Information about the competing contractor who would be a party to the proposed conduct, and the nature of the competing contractor's interest in the procurement.

(iv) A description of the possible gratuity or other thing of value if the request concerns conduct that might violate the prohibition of subsection 27(b)(2) of the Act. It shall be the responsibility of the individual requesting an advisory opinion to furnish an appraisal or good faith estimate of market value where the value of an item is in question.

(v) Specific information about the particular duties to be performed on behalf of the competing contractor if the request concerns conduct that might violate either or both of the prohibitions of subsection 27(f) of the Act. Where the issue concerns whether employment with a subcontractor is permissible under subsection 27(f)(2), the request shall include information about the subcontract level and dollar amount, the subcontractor's role in assisting the prime contractor in negotiating the

prime contract, and the individual's role in directing or recommending the subcontractor to the prime contractor as a source for the subcontract or reviewing and approving the award or modification of the subcontract.

(3) Within 30 days after the date a request containing complete information is received, or as soon thereafter as practicable, the agency ethics official shall issue an opinion as to whether proposed conduct is proper or would violate section 27 of the Act.

(i) Where complete information is not included in the request, the agency ethics official may ask the requester to provide any information reasonably available to that person, and the 30-day period will run from the date that additional information is received. Additional information may also be requested from other persons, including the Source Selection Authority, the contracting officer, or the requester's immediate supervisor.

(ii) Where the opinion cannot be issued within 30 days, the reason for the delay will be documented in the file. Acceptable reasons for delay include, but are not limited to, the necessity for the agency ethics official to independently develop information not reasonably available to the requester, or to verify questionably information furnished by the requester.

(iii) In issuing an opinion, the agency ethics official may rely upon the accuracy of information furnished by the requester or other agency sources, unless he has reason to believe that the information is fraudulent, misleading, or otherwise incorrect.

(4) A copy of the request and ethics advisory opinion shall be retained for a period of 6 years. Agencies shall not provide copies of the advisory opinions to any person other than the requester, except with the express authorization of the requester or where release is otherwise permitted by law.

(5) Where the requester engages in conduct in good faith reliance upon an ethics advisory opinion, or a competing contractor engages in conduct based upon good faith reliance on the requester's ethics advisory opinion, neither the requester nor the competing contractor shall be found to have knowingly violated the restriction in issue. Where the requester or the competing contractor has actual knowledge or reason to believe that the opinion is based upon fraudulent, misleading, or otherwise incorrect information provided by the requester, their reliance upon the opinion will not be deemed to be in good faith.

3.104-9 Certification requirements.

(a) *Applicability.* Subsection 27(e) of the Act requires certifications, prior to the award of a Federal agency contract or contract modification for property or services in excess of \$100,000 awarded or executed on or after December 1, 1990, by the officer or employee of the contractor responsible for the offer or bid for that particular contract or contract modification for property or services, and by the contracting officer for that procurement.

(b) *Competing contractor certification.* (1) Except as provided in 3.104-9(f), contracting officers shall require the competing contractor to—

(i) Certify in writing to the contracting officer responsible for the procurement that, to the best of his or her knowledge and belief, such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), or (f) of the Act (see 3.104-3) as implemented in the FAR; or

(ii) Disclose to such contracting officer any and all such information, and certify in writing to such contracting officer that any and all such information has been disclosed; and

(iii) Certify in writing to such contracting officer that, to the best of his or her knowledge and belief, each officer, employee, agent, representative, and consultant of such competing contractor who, on or after December 1, 1990, has participated personally and substantially in the preparation or submission of such bid or offer, or in a modification of a contract, as the case may be, has certified in writing to such competing contractor that he or she—

(A) Is familiar with, and will comply with, the requirements of subsection 27(a) of the Act (see 3.104-3) as implemented in the FAR; and

(B) Will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification of a contract, as the case may be, any information concerning a violation or possible violation of subsections 27 (a), (b), or (f) of the Act (see 3.104-3), occurring on or after December 1, 1990, as implemented in the FAR.

(2) Subcontractors are not required to submit the certificate required by subsection 27(e)(1) of the Act. However, nothing in 3.104 precludes a competing contractor from requesting certifications from its subcontractors.

(3) The signed certifications prescribed in 3.104-10 shall be submitted as follows:

(i) *Procurements exceeding \$100,000 using sealed bidding procedures:* (A) For procurements using sealed bidding

procedures, the signed certifications shall be submitted by each bidder with the bid submission, except for procurements using two-step sealed bidding procedures (see subpart 14.5). For those procurements, the certifications shall be submitted with submission of the step two sealed bids. A certificate is not required for indefinite delivery contracts (see subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed \$100,000.

(B) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options (see 3.104-4(e)) exceeds \$100,000.

(C) Failure of a bidder to submit the signed certificate with its bid render the bid nonresponsive.

(ii) *Procurements exceeding \$100,000 using other than sealed bidding procedures:* (A) For procurements, including contract modifications, made using procedures other than sealed bidding, the signed certifications shall be submitted by the successful offeror to the contracting officer within the time period specified by the contracting officer when requesting the certificates, except as provided in subdivisions (b)(3)(ii) (B) through (F) of this subsection. In no event shall the certificate be submitted subsequent to award of a contract or execution of a contract modification.

(B) For letter contracts, other unpriced contracts, or unpriced contract modifications, whether or not the unpriced contract or modification contains a maximum or not to exceed price, the signed certifications shall be submitted prior to the award of the letter contract, unpriced contract, or unpriced contract modification, and prior to the definitization of the letter contract or the establishment of the price of the unpriced contract or unpriced contract modification. The second certification shall apply only to the period between award of the letter contract and execution of the document definitizing the letter contract, or award of the unpriced contract or unpriced contract modification and execution of the document establishing the definitive price of such unpriced contract or unpriced contract modification.

(C) For basic ordering agreements—prior to the execution of a priced order; prior to the execution of an unpriced order, whether or not the unpriced order contains a maximum or not to exceed price; and prior to establishing the price of an unpriced order. The second certificate to be submitted for unpriced

orders shall apply only to the period between award of the unpriced order and execution of the document establishing the definitive price for such order.

(D) A certificate is not required for indefinite delivery contracts (see subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed \$100,000.

(E) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options exceeds \$100,000.

(F) For purposes of contracts entered into under section 8(a) of the SBA, the business entity with whom the SBA contracts, and not the SBA, shall be required to comply with the certification requirements of subsection 27(e). The SBA shall obtain the signed certificate from the business entity, and forward the certificate to the contracting officer prior to the award of a contract to the SBA.

(G) Failure of an offeror to submit the signed certificate within the time prescribed by the contracting officer is a failure to comply with a material requirement of the solicitation and shall cause the offer to be rejected.

(c) *Contracting officer certifications.* (1) In accordance with subsection 27(e)(2) of the Act, a Federal agency may not award a contract for the procurement of property or services, or agree to a modification of any contract, if the contract or contract modification exceeds \$100,000, unless the contracting officer responsible for such procurement—

(i) Certifies in writing to the head of such agency that, to the best of his or her knowledge and belief, the contracting officer has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), or (f) of the Act (see 3.104-3), as implemented in the FAR, pertaining to such procurement; or

(ii) Discloses to the head of such agency any and all such information and certifies in writing that any and all such information has been disclosed.

(2) Immediately prior to contract award or execution of a contract modification, the contracting officer shall execute the following certificate and maintain the completed certificate in the contract file:

Contracting Officer Certificate of Procurement Integrity

1. I, [Name of contracting officer], hereby certify that, to the best of my knowledge and

belief, with the exception of any information described in this certificate, have no information concerning a violation or possible violation of subsection (a), (b), (d), or (f) of section 27 of the Office of Federal Procurement Policy Act* (41 U.S.C. 423), as implemented in the FAR, occurring during the conduct of this procurement (contract/modification number).

2. Violations or possible violations: (Continue on plain bond paper if necessary, and label Contracting Officer Certificate of Procurement Integrity (Continuation Sheet), ENTER "NONE" IF NONE EXISTS.)

(Signature of contracting officer and date)

*Section 27, as amended, became effective on December 1, 1990. THIS CERTIFICATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT CERTIFICATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER TITLE 18, UNITED STATES CODE, SECTION 1001.

(End of certification)

(d) *Additional certifications.* (1) Subsection 27(e)(3) of the Act provides that the head of a Federal agency may require any procurement official or any competing contractor, at any time during the conduct of any Federal agency procurement of property or services—

(i) To certify in writing that, to the best of his or her knowledge and belief, such procurement official or the officer or employee of the competing contractor responsible for the offer or bid for a contract or the modification of a contract, has no information concerning a violation or possible violation of subsections 27 (a), (b), (d), and (f) of the Act (see 3.104-3), as implemented in the FAR, occurring during the procurement; or

(ii) To disclose any and all such information and to certify in writing that any and all such information has been disclosed.

(2) In addition to the Head of the Agency, additional certifications may be required only by the HCA or his or her designee, provided that the designee is an individual of General Officer, Flag, SES or equivalent rank and is at least one organizational level above the contracting officer.

(3) Any additional certifications shall be submitted to the contracting officer unless another person is specified by the individual requiring the additional certifications.

(4) Each procurement official or competing contractor shall be afforded a reasonable time to comply with the additional certification requirements.

(5) A competing contractor's failure to submit any additional certifications that

may be required shall cause the competing contractor's offer to be rejected.

(e) *Recordkeeping requirements.* (1) In accordance with subsections 27(e)(5) (A) and (B) and 27(e)(7)(A) of the Act, the contracting officer responsible for the award or modification of a contract in excess of \$100,000 shall maintain, as part of the contract file—

(i) All competing contractor, contracting officer, and procurement official certifications required by subsections 27 (e)(1), (e)(2), and (e)(4) of the Act, and any additional certifications required by subsection 27(e)(3) of the Act for that particular procurement.

(ii) All certifications required by subsection 27(l) of the Act (see 3.104-12) from individuals acting as procurement officials on behalf of the procuring agency, who are, or are employed by, contractors, subcontractors, consultants, experts, or advisors (other than competing contractors).

(iii) A record of all persons who have been authorized by the Head of the Agency or the contracting officer to have access to proprietary or source selection information regarding the procurement. When classes of persons have been authorized, this record shall identify the class of persons so authorized and, to the maximum extent practicable, the names of the individuals within the class.

(2) Certifications obtained from Government officers or employees (see 3.104-4(d)) who are required to submit a certification under subsection 27(l) of the Act shall be maintained in accordance with agency procedures.

(3) Ethics advisory opinions shall be retained, in accordance with agency procedures, for a period of 6 years.

(f) *Exceptions to certification requirements.* Pursuant to subsection 27(e)(7)(B) of the Act, certification requirements set forth in 3.104-9 do not apply—

(1) To contracts with a foreign government or an international organization that are not required to be awarded using competitive procedures pursuant to section 303(c)(4) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(4)), or section 2304(c)(4) of title 10, United States Code; or

(2) In an exceptional case, when the Head of the Agency concerned determines in writing that the certification requirement should be waived. This authority may not be delegated. The contracting officer shall submit the request for waiver in accordance with agency procedures. The request shall clearly identify the

procurement or class of procurements and provide the rationale for the requested waiver. The decision of the agency head shall state the reasons for approving or disapproving the waiver. The agency head shall promptly notify Congress in writing of each waiver approved. Procurements for which a waiver may be appropriate include—

(i) Where prices are set by law or regulation;

(ii) Where terms and conditions of a contract are specified by an agreement with a foreign government or governments;

(iii) Where supplies or services are provided by foreign nationals to United States facilities overseas for use outside the United States;

(iv) Where a foreign government specifies a particular U.S. contractor to satisfy its requirements (see 6.302-4(b)(1)).

3.104-10 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the provision at 52.203-8, Requirement for Certificate of Procurement Integrity, in all solicitations where the resultant contract award is expected to exceed \$100,000, unless, pursuant to 3.104-9(f), a certification is not required or a waiver has been granted. For procurements using other than sealed bidding procedures, the contracting officer shall substitute Alternate I for paragraph (c) of that provision.

(b) The contracting officer shall insert the clause at 52.203-9, Requirement for Certificate of Procurement Integrity-Modification, in all solicitations where the resultant contract award is expected to exceed \$100,000, all contracts in excess of \$100,000, and modifications to contracts which do not already contain the clause when the modification is expected to exceed \$100,000, unless, pursuant to 3.104-9(f), a certificate is not required or a waiver has been granted.

(c) The contracting officer shall insert the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity, in all solicitations where the resultant contract award is expected to exceed the small purchase limitation (see 13.000) and all contracts and modifications to contracts exceeding that limitation which do not already contain the clause when the modification is expected to exceed that limitation.

(d) The contracting officer shall insert the clause at 52.203-13, Procurement Integrity-Service Contracting, in all solicitations and contracts where the Government is procuring or may order the services of contractor employees to

serve as procurement officials for another agency procurement. In addition, the contracting officer shall insert the provisions and clauses at 52.203-8, 52.203-9, and 52.203-10 in such solicitations and contracts as prescribed in this subsection.

3.104-11 Processing violations or possible violations.

(a) If the contracting officer makes or receives a disclosure of information pursuant to subsection 27(e) of the Act or otherwise receives or obtains information of a violation or possible violation of subsections 27 (a), (b), (d), or (f) of the Act (see 3.104-3), the contracting officer shall determine whether the reported violation or possible violation has any impact on the pending award or selection of the source therefor.

(1) If the contracting officer concludes that there is no impact on the procurement, the contracting officer shall forward the information concerning the violation or possible violation, accompanied by appropriate documentation supporting that conclusion, to an individual designated in accordance with agency procedures. With the concurrence of that individual, the contracting officer shall, without further approval, proceed with the procurement. The individual concurring with that conclusion shall forward all information relating to the violation or possible violation to the HCA, or his or her designee, to satisfy the disclosure requirements of subsection 27(e)(2) of the Act.

(2) If the individual reviewing the contracting officer's conclusion does not agree with that conclusion, he or she shall advise the contracting officer to withhold award and shall promptly forward the information and documentation to the HCA or his or her designee.

(3) If the contracting officer determines that the violation or possible violation impacts the procurement, the contracting officer shall promptly forward the information to the HCA or his or her designee.

(b) The HCA or his or her designee receiving any information describing an actual or possible violation of subsection 27 (a), (b), (d), or (f) of the Act, shall review all information available and take appropriate action in accordance with agency procedures, such as—

- (1) Advising the contracting officer to continue with the procurement;
- (2) Causing an investigation to be conducted;

(3) Referring the information disclosed to appropriate criminal investigative agencies;

(4) Determining that a violation occurred.

(c) Prior to determining that a competing contractor (see 3.104-4(b)) has violated the Act, the HCA or his or her designee may request information from appropriate parties regarding the violation or possible violation when considered in the best interests of the Government.

(d) If the HCA or his or her designee determines that the prohibitions of section 27 of the Act have been violated, then the HCA or his or her designee may direct the contracting officer to—

(1) If a contract has not been awarded, or a contract modification has not been executed—

- (i) Cancel the procurement;
- (ii) Disqualify an offeror; or
- (iii) Take any other appropriate actions in the interests of the Government.

(2) If a contract has been awarded or a contract modification has been executed—

(i) Effect appropriate contractual remedies, including profit recapture as provided for in the clause at 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity;

(ii) Void or rescind the contract, or contract modification; or

(iii) Take any other appropriate actions in the best interests of the Government.

(3) Refer the matter to the agency suspension and debarment official.

(e) The HCA or his or her designee shall, in his or her best judgment, recommend or direct an administrative or contractual remedy commensurate with the severity and effect of the violation.

(f) If the HCA or his or her designee receiving information concerning a violation or possible violation determines that award is justified by urgent and compelling circumstances, or is otherwise in the interests of the Government, he or she may authorize the contracting officer to award the contract or execute the contract modification after notification to the Head of the Agency in accordance with agency procedures.

(g) The designee of the HCA referenced in paragraphs (a), (b), (c), (d), and (e) of this subsection must be an individual at least one organizational level above the contracting officer and be of General Officer, Flag, SES or equivalent rank.

3.104-12 Ethics program training requirements.

(a) Subsection 27(l) of the Act provides that the head of each Federal agency shall establish a procurement ethics training program for its procurement officials. The program shall, as a minimum—

(1) Provide for the distribution of a written explanation of subsections 27 (a) through (f) of the Act to such procurement officials; and

(2) Require each such procurement official, as a condition of serving as a procurement official, to certify in writing that he or she is familiar with the provisions of subsections 27 (b), (c), and (e) of the Act and will not engage in any conduct prohibited by such subsections, and will report immediately to the contracting officer any information concerning a violation or possible violation of subsection 27 (a), (b), (d), or (f) of the Act as implemented in the FAR.

(3) Certification made under section 27 as originally enacted and implemented in the FAR do not satisfy the certification requirements of subparagraph (a)(2) of this subsection. Agencies may use Optional Form 333 at 53.302-333 to obtain the certifications required by subparagraph (a)(2) of this subsection.

(b) Contractors, subcontractors, consultants, experts, or advisors (other than competing contractors) are responsible for establishing a procurement ethics training program for individuals in their employ who may serve as procurement officials on behalf of a Federal agency. The program shall, as a minimum, comply with subparagraphs (a)(1) and (a)(2) of this subsection.

PART 4—ADMINISTRATIVE MATTERS

3. Section 4.802 is amended by revising paragraph (e) to read as follows:

4.802 Contract files.

* * * * *

(e) Contents of contract files that are proprietary or source selection information as defined in 3.104-4 shall be protected from disclosure to unauthorized persons (see 3.104-5).

4. Section 4.803 is amended by adding paragraphs (a)(42) and (a)(43) to read as follows:

4.803 Contents of contract files.

(a) * * *

(42) All certifications required by 3.104-9(e)(1).

(43) For contracts and contract modifications in excess of \$100,000, a

record of all persons or classes of persons authorized to have access to proprietary or source selection information and, to the maximum extent practicable, the names of all individuals within the class.

PART 9—CONTRACTOR QUALIFICATIONS

5. Section 9.106-3 is amended by revising paragraph (b) to read as follows:

9.106-3 Interagency preaward surveys.

(b) For contracts or contract modifications expected to exceed \$100,000, the surveying activity shall furnish with its report a list of all persons, classes of persons, and to the maximum extent practicable, the names of all individuals within the class, who have been provided access to the proprietary or source selection information (see 3.104-5(d)) at or by the surveying activity.

PART 14—SEALED BIDDING

6. Section 14.211 is amended in paragraph (a) by adding a fourth sentence to read as follows:

14.211 Release of acquisition information.

(a) * * * See 3.104 regarding requirements for proprietary and source selection information including access to and disclosure thereof.

7. Section 14.404-2 is amended by adding paragraph (m) to read as follows:

14.404-2 Rejection of individual bids.

(m) A bid shall be rendered nonresponsive and rejected if the bidder fails to submit the signed certificate (see 3.104-9) required by section 27 of the Office of Federal Procurement Policy Act, as amended (42 U.S.C. 423), with its bid.

PART 15—CONTRACTING BY NEGOTIATION

8. Section 15.413 is added to read as follows:

15.413 Disclosure and use of information before award.

See 3.104 for statutory and regulatory requirements related to the disclosure of proprietary and source selection information.

15.413-1 [Amended]

9. Section 15.413-1 is amended in paragraph (a) by removing the words "not having a legitimate interest" and

inserting in their place "except as otherwise authorized in accordance with 3.104 (for procedures regarding requests for information from Members of Congress, see 5.403)"; and in paragraph (c) by removing the reference "15.407(c)(8)" and inserting in its place "3.104".

10. Section 15.413-2 is amended by adding paragraph (f)(6) to read as follows:

15.413-2 Alternate II.

(f) * * *
(6) Prior to release of a proposal, the contracting officer obtains from the evaluator the certificate(s) required by 3.104-12.

15.508 [Amended]

11. Section 15.508 is amended in paragraph (b) by removing the reference "(see 15.509)" and inserting in its place "(see 15.509 and 3.104)".

12. Section 15.509 is amended in paragraph (d) by revising the first sentence under "Unsolicited Proposal, Use of Data Limited"; by revising paragraph (f)(4); and in paragraph (h) by revising the second sentence to read as follows:

15.509 Limited use of data.

(d) * * *
Unsolicited Proposal, Use of Data Limited

All Government personnel must exercise extreme care to ensure that the information in this proposal is not disclosed to an individual who has not been authorized access to such data in accordance with 3.104, and is not duplicated, used, or disclosed in whole or in part for any purpose other than evaluation of the proposal, without the written permission of the offeror. * * *

(f) * * *
(4) Require any non-Government evaluator to give a written agreement stating that data in the proposal will not be disclosed to others outside the Government, and to complete the certification required by 3.104-9.

(h) * * * The coordinating office shall—
(1) Clearly mark the cover sheet with the legend in 15.509(d) or as modified in 15.509(f);
(2) Obtain a written agreement from any non-Government evaluator stating that data in the proposal will not be disclosed to persons outside the Government; and
(3) Obtain the certifications required by 3.104-9 and a listing of all persons

authorized access to proprietary information by the activity performing the evaluation.

13. Section 15.608 is amended by adding paragraph (b)(5) to read as follows:

15.608 Proposal evaluation.

(b) * * *
(5) A violation or possible violation of section 27 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), has occurred (see 3.104).

14. Section 15.610 is amended by adding new paragraph (e); by removing paragraph (d) introductory text and paragraph (d)(1); by redesignating existing paragraphs (d)(2) and (d)(3) as new paragraphs (e)(1) and (e)(2); and by adding new paragraph (d) to read as follows:

15.610 Written or oral discussion.

(d) The contracting officer and other Government personnel involved shall not engage in technical leveling (i.e., helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal).

(e) The following conduct may constitute prohibited conduct under section 27 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), and subpart 3.104 to which civil and criminal penalties and administrative remedies apply.

15. Section 15.612 is amended by revising paragraph (e) to read as follows:

15.612 Formal source selection.

(e) *Safeguarding information.* Consistent with part 24 and subpart 3.104, agencies shall exercise particular care to protect source selection information.

(1) During the source selection process, disclosure of proprietary or source selection information shall be governed by 3.104-5 and applicable agency regulations. After the source selection, releasing authority shall be as prescribed in agency procedures. In all cases, agency procedures should prescribe the releasing authority.

(2) Government personnel shall not contact or visit a contractor regarding a proposal under source selection evaluation, without the prior approval of

the source selection authority (see 3.104 for additional restrictions).

16. Section 15.805-5 is amended by revising paragraph (k) to read as follows:

15.805-5 Field pricing support.

(k) For contracts and contract modifications expected to exceed \$100,000, activities submitting field pricing reports, including audit and technical reports, shall furnish with each report a list of all persons, or classes of persons, and, to the maximum extent practicable, the names of the individuals within the class, who have been provided access to the proprietary or source selection information (see 3.104-5(d)) at or by the activity.

PART 37—SERVICE CONTRACTING

17. Section 37.103 is amended by adding paragraph (c) to read as follows:

37.103 Contracting officer responsibility.

(c) Verify that the contract file contains the certifications required of contractor employees serving as Government procurement officials (see 3.104-9).

37.207 [Amended]

18. Section 37.207 is amended by inserting at the end of paragraph (d) after the semicolon, and word "and"; by removing at the end of paragraph (e) "and" and inserting a period; and by removing paragraph (f).

37.208 [Removed]

19. Section 37.208 is removed.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

20. Section 37.203-8 is revised to read as follows:

52.203-8 Requirement for Certificate of Procurement Integrity.

As prescribed in 3.104-10(a), insert the following provision:

Requirement for Certificate of Procurement Integrity (SEP 1990)

(a) *Definitions.* The definitions at FAR 3.104-4 are hereby incorporated in this provision.

(b) *Certifications.* As required in paragraph (c) of this provision, the officer or employee responsible for this offer shall execute the following certification:

Certificate of Procurement Integrity

(1) I, [Name of certifier], am the officer or employee responsible for the preparation of this offer and hereby certify that, to the best

of my knowledge and belief, with the exception of any information described in this certificate, I have no information concerning a violation of possible violation of subsection 27(a), (d), or (f) of the Office of Federal Procurement Policy Act, as amended* (41 U.S.C. 423), (hereinafter referred to as "the Act"), as implemented in the FAR, occurring during the conduct of this procurement (solicitation number).

(2) As required by subsection 27(e)(1)(B) of the Act, I further certify that, to the best of my knowledge and belief, each officer, employee, agent, representative, and consultant of [Name of Offeror] who has participated personally and substantially in the preparation or submission of this offer has certified that he or she is familiar with, and will comply with, the requirements of subsection 27(a) of the Act, as implemented in the FAR, and will report immediately to me any information concerning a violation or possible violation of the Act, as implemented in the FAR, pertaining to this procurement.

(3) Violations or possible violations: (Continue on plain bond paper if necessary and label Certificate of Procurement Integrity (Continuation Sheet), ENTER NONE IF NONE EXIST)

(4) I agree that, if awarded a contract under this solicitation, the certifications required by subsection 27(e)(1)(B) of the Act shall be maintained in accordance with paragraph (f) of this provision.

[Signature of the officer or employee responsible for the offer and date]
[Typed name of the officer or employee responsible for the offer]

*The Act became effective on December 1, 1990.

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(End of certification)

(c)(1) For procurements using sealed bidding procedures, the signed certifications shall be submitted by each bidder with the bid submission except for procurements using two-step sealed bidding procedures (see subpart 14.5). For those procurements, the certifications shall be submitted with submission of the step two sealed bids. A certificate is not required for indefinite delivery contracts (see subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed \$100,000.

(2) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract and contract modification and all options (see 3.104-4(e)) exceeds \$100,000.

(3) Failure of a bidder to submit the signed certificate with its bid shall render the bid nonresponsive.

(d) Pursuant to FAR 3.104-9(d), the Offeror may be requested to execute additional certifications at the request of the Government. Failure of an Offeror to submit the additional certifications shall cause its offer to be rejected.

(e) A certification containing a disclosure of a violation or possible violation will not necessarily result in the withholding of an award under this solicitation. However, the Government, after evaluation of the disclosure, may cancel this procurement or take any other appropriate actions in the interests of the Government, such as disqualification of the Offeror.

(f) In making the certification in subparagraph (b)(2) of the certificate, the officer or employee of the competing contractor responsible for the offer may rely upon a one-time certification from each individual required to submit a certification to the competing contractor, supplemented by periodic training. These certifications shall be maintained by the Contractor for 6 years from the date a certifying employee's employment with the company ends or, for an agent, representative, or consultant, 6 years from the date such individual ceases to act on behalf of the Contractor.

(g) Certifications under paragraphs (b) and (d) of this provision are material representations of fact upon which reliance will be placed in awarding a contract. (End of provision)

Alternate 1 (Sep. 1990). Procurements using other than sealed bidding procedures:

(c) For procurements, including contract modifications, in excess of \$100,000 made using procedures other than sealed bidding, the signed certifications shall be submitted by the successful Offeror to the Contracting Officer within the time period specified by the Contracting Officer when requesting the certificates except as provided in subparagraphs (c)(1) through (c)(5) of this clause. In no event shall the certificate be submitted subsequent to award of a contract or execution of a contract modification:

(1) For letter contracts, other unpriced contracts, or unpriced contract modifications, whether or not the unpriced contract or modification contains a maximum or not to exceed price, the signed certifications shall be submitted prior to the award of the letter contract, unpriced contract, or unpriced contract modification, and prior to the definitization of the letter contract or the establishment of the price of the unpriced contract or unpriced contract modification. The second certification shall apply only to the period between award of the letter contract and execution of the document definitizing the letter contract, or award of the unpriced contract or unpriced contract modification and execution of the document establishing the definitive price of such unpriced contract or unpriced contract modification.

(2) For basic ordering agreements, prior to the execution of a priced order; prior to the execution of an unpriced order, whether or not the unpriced order contains a maximum or not to exceed price; and, prior to establishing the price of an unpriced order. The second certificate to be submitted for

unpriced orders shall apply only to the period between award of the unpriced order and execution of the document establishing the definitive price for such order.

(3) A certificate is not required for indefinite delivery contracts (see subpart 16.5) unless the total estimated value of all orders eventually to be placed under the contract is expected to exceed \$100,000.

(4) For contracts and contract modifications which include options, a certificate is required when the aggregate value of the contract or contract modification and all options (see 3.104-4(e)) exceeds \$100,000.

(5) For purposes of contracts entered into under section 8(a) of the SBA, the business entity with whom the SBA contracts, and not the SBA, shall be required to comply with the certification requirements of subsection 27(e). The SBA shall obtain the signed certificate from the business entity and forward the certificate to the Contracting Officer prior to the award of a contract to the SBA.

(6) Failure of an Offeror to submit the signed certificate within the time prescribed by the Contracting Officer shall cause the offer to be rejected.

21. Section 52.203-9 is revised to read as follows:

52.203-9 Requirement for Certificate of Procurement Integrity—Modification

As prescribed in 3.104-10(b), insert the following clause:

Requirement for Certificate of Procurement Integrity—Modification (Sep. 1990)

(a) *Definitions.* The definitions set forth in FAR 3.104-4 are hereby incorporated in this clause.

(b) The Contractor agrees that it will execute the certification set forth in paragraph (c) of this clause when requested by the Contracting Officer in connection with the execution of any modification of this contract.

(c) *Certification.* As required in paragraph (b) of this clause, the officer or employee responsible for the modification proposal shall execute the following certification:

Certificate of Procurement Integrity—Modification (Sep. 1990)

(1) I, [Name of certifier], am the officer or employee responsible for the preparation of this modification proposal and hereby certify that, to the best of my knowledge and belief, with the exception of any information described in this certification, I have no information concerning a violation or possible violation of subsection 27(a), (b), (d), or (f) of the Office of Federal Procurement Policy Act, as amended * (41 U.S.C. 423), (hereinafter referred to as "the Act"), as implemented in the FAR, occurring during the conduct of this procurement (contract and modification number).

(2) As required by subsection 27(e)(1)(B) of the Act, I further certify that to the best of my knowledge and belief, each officer, employee, agent, representative, and consultant of [Name of Offeror] who has participated personally and substantially in the preparation or submission of this proposal has certified that he or she is familiar with,

and will comply with, the requirements of subsection 27(a) of the Act, as implemented in the FAR, and will report immediately to me any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act, as implemented in the FAR, pertaining to this procurement.

(3) Violations or possible violations: (Continue on plain bond paper if necessary and label Certificate of Procurement Integrity—Modification (Continuation Sheet), enter NONE if none exists)

[Signature of the officer or employee responsible for the modification proposal and date]

[Typed name of the officer or employee responsible for the modification proposal]

* The Act became effective on December 1, 1990.

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(End of certification)

(d) In making the certification in paragraph (2) of the certificate, the officer or employee of the competing Contractor responsible for the offer or bid, may rely upon a one-time certification from each individual required to submit a certification to the competing Contractor, supplemented by periodic training. These certifications shall be maintained by the Contractor for a period of 6 years from the date a certifying employee's employment with the company ends or, for an agency, representative, or consultant, 6 years from the date such individual ceases to act on behalf of the contractor.

(e) The certification required by paragraph (c) of this clause is a material representation of fact upon which reliance will be placed in executing this modification. (End of clause)

22. Section 52.203-10 is revised to read as follows:

52.203-10 Price or Fee Adjustment for Illegal or Improper Activity.

As prescribed in 3.104-10(c) insert the following clause:

Price or Fee Adjustment for Illegal or Improper Activity (SEP 1990)

(a) The Government, at its election, may reduce the price of a fixed-price type contract or contract modification and the total cost and fee under a cost-type contract or contract modification by the amount of profit or fee determined as set forth in paragraph (b) of this clause if the head of the contracting activity or his or her designee determines that there was a violation of subsection 27(a) of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), as implemented in the FAR. In the case of a contract modification, the fee subject to reduction is the fee specified in the particular contract modification at the time of execution, except

as provided in subparagraph (b)(5) of this clause.

(b) The price or fee reduction referred to in paragraph (a) of this clause shall be—

(1) For cost-plus-fixed-fee contracts, the amount of the fee specified in the contract at the time of award;

(2) For cost-plus-incentive-fee contracts, the target fee specified in the contract at the time of award, notwithstanding any minimum fee or "fee floor" specified in the contract.

(3) For cost-plus-award-fee contracts—

(i) The base fee established in the contract at the time of contract award;

(ii) If no base fee is specified in the contract, 30 percent of the amount of each award fee otherwise payable to the Contractor for each award fee evaluation period or at each award fee determination point.

(4) For fixed-price-incentive contracts, the Government may—

(i) Reduce the contract target price and contract target profit both by an amount equal to the initial target profit specified in the contract at the time of contract award; or

(ii) If an immediate adjustment to the contract target price and contract target profit would have a significant adverse impact on the incentive price revision relationship under the contract, or adversely affect the contract financing provisions, the Contracting Officer may defer such adjustment until establishment of the total final price of the contract. The total final price established in accordance with the incentive price revision provisions of the contract shall be reduced by an amount equal to the initial target profit specified in the contract at the time of contract award and such reduced price shall be the total final contract price.

(5) For firm-fixed-price contracts or contract modifications, by 10 percent of the initial contract price; 10 percent of the contract modification price; or a profit amount determined by the Contracting Officer from records or documents in existence prior to the date of the contract award or modification.

(c) The Government may, at its election, reduce a prime contractor's price or fee in accordance with the procedures of paragraph (b) of this clause for violations of the Act by its subcontractors by an amount not to exceed the amount of profit or fee reflected in the subcontract at the time the subcontract was first definitively priced.

(d) In addition to the remedies in paragraphs (a) and (c) of this clause, the Government may terminate this contract for default. The rights and remedies of the Government specified herein are not exclusive, and are in addition to any other rights and remedies provided by law or under this contract. (End of clause)

23. Sections 52.203-13 is added to read as follows:

52.203-13 Procurement Integrity-Service Contracting.

As prescribed in 3.104-10(d), insert the following clause:

Procurement Integrity—Service Contracting (Sep 1990)

(a) *Definitions.* The definitions in FAR 3.104-4 are hereby incorporated in this clause.

(b) The Contractor shall establish a procurement ethics training program for its employees serving as procurement officials. The program shall, as a minimum—

(1) Provide for the distribution of written explanations of the provisions of section 27 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 423), as implemented in the FAR to such employees; and

(2) Require each such employee, as a condition of serving as a procurement official, to certify to the Contracting Officer that he or she is familiar with the provisions of the Act, as implemented in the FAR, and will not engage in any conduct prohibited by

subsection 27 (a), (b), (d), or (f) of the Act, as implemented in the FAR, and will report immediately to the Contracting Officer any information concerning a violation or possible violation of the prohibitions.

(c) Pursuant to FAR 3.104-9(d), a Contractor employee who is serving as a procurement official may be requested to execute additional certifications.

(d) If a Contractor employee serving as a procurement official ceases performance of these duties during the conduct of such procurement expected to result in a contract or contract modifications in excess of \$100,000, such employee shall certify to the Contracting Officer that he or she understands the continuing obligation, during the conduct of the agency procurement, not to disclose proprietary or source selection information related to such agency procurement.

(End of clause)

52.237-9 [Removed and Reserved]

24. Section 52.237-9 is removed and reserved.

PART 53—FORMS

25. Section 53.203 is amended by revising the title and by adding paragraph (b) to read as follows:

53.203 Improper business practices and personnel conflicts of interest.

(b) *OF 333 (9/90), Procurement Integrity Certification for Procurement Officials.* OF 333 is prescribed for use, as specified in 3.104-12(a)(3).

26. Section 53.302-333 is added to read as follows:

§ 53.302-333 Procurement Integrity Certification for Procurement Officials.

PROCUREMENT INTEGRITY CERTIFICATION
FOR PROCUREMENT OFFICIALS

As a condition of serving as a procurement official, I _____
(typed or printed name)
_____ hereby certify that I am familiar
with the provisions of subsections 27(b), (c), and (e) of the Office of Federal
Procurement Policy Act (41 USC 423) as amended by section 814 of Public
Law 101-189. I further certify that I will not engage in any conduct
prohibited by such subsections and will report immediately to the contracting
officer any information concerning a violation or possible violation of
subsections 27(a), (b), (d), or (f) of the Act and applicable implementing
regulations. A written explanation of subsections 27(a) through (f) has been
made available to me. I understand that, should I leave the Government during
the conduct of a procurement for which I have served as a procurement
official, I have a continuing obligation under section 27 not to disclose
proprietary or source selection information relating to that procurement and a
requirement to so certify.

SIGNATURE OF PROCUREMENT OFFICIAL

DATE

DEPARTMENT OR AGENCY

OFFICE TELEPHONE NUMBER

This form is authorized for use and local
reproduction through December 31, 1990.

OPTIONAL FORM 333 (9-90)
Prescribed by GSA - FAR (48 CFR) 53.203(b)

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